

Minutes

D.C. OFFICE OF EMPLOYEE APPEALS (OEA) BOARD MEETING

Tuesday, February 26, 2019

Location: 955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024

Persons Present: Lasheka Brown (OEA General Counsel), Sheila Barfield (OEA Executive Director), Sommer Murphy (OEA Deputy General Counsel), Clarence Labor (OEA Board Chair), Vera Abbott (OEA Board Member) (11:30 a.m.), Patricia Hobson Wilson (OEA Board Member), Jelani Freeman (OEA Board Member), Peter Rosenstein (OEA Board Member) (via telephone), Wynter Clarke (OEA Paralegal), and Abraham Davis, Jr. (Member of the Public).

- I. Call to Order** – Clarence Labor called the meeting to order at 11:08 a.m.
- II. Ascertainment of Quorum** – There was a quorum of Board members present for the office to conduct business.
- III. Adoption of Agenda** – Patricia Hobson Wilson moved to adopt the Agenda. Jelani Freeman seconded the motion. The Agenda was adopted by the Board.
- IV. Minutes from Previous Meeting** – The December 18, 2018 meeting minutes were reviewed. There were no corrections. The minutes were accepted.
- V. New Business**
 - A. Public Comments on Petitions for Review**
 1. Abraham Davis, Jr. spoke on behalf of Employee on the matter of Estate of Alexis Parker v. Department of Health. He provided that at all times Employee was Career Service status. He explained that the AJ should have addressed the complicated issues raised by the parties as it pertains pursuant to DPR sections 816.1, 816.2, 816.4, and 816.5.
 - B. Summary of Cases**
 1. **Estate of Alexis Parker v. Department of Health, OEA Matter No. J-0007-11R13R17** – This case has been previously before the Board. After several remands, the AJ held an evidentiary hearing on March 12, 2018. The AJ issued her Second Initial Decision on Remand on July 23, 2018. She found that Employee was hired through open competition. The AJ determined that the Public Health Outreach Technician position was open to the public, without regard to current or former employment with the District government. She opined that the four ARPP candidates were matched to the vacancy and their qualifications were reviewed before those of the general public. The AJ determined that because Employee was appointed as a result of open competition and her new position was in a different line of work from her previous position, Employee was required to serve a second probationary

period. Additionally, the AJ found that Employee had a break in service of more than one day from when her previous position ended to the start date of her new position. The AJ held that in accordance with DPM § 814.3, a termination during an employee's probationary period cannot be appealed to OEA. Accordingly, the AJ dismissed the matter for lack of jurisdiction.

On August 13, 2018, Employee filed a Petition for Review of the Second Initial Decision on Remand. She contests the AJ's assertion that she was appointed through ARPP and not through open competition. Employee also argues that there is not substantial evidence in the record to support that she was hired or appointed through open competition. She asserts that the AJ did not have the authority to determine if the positions are in different lines of work, but she was responsible for making the finding that the appropriate personnel authority made the determination that the positions were in different lines of work. Furthermore, Employee contends that the AJ inaccurately assessed the testimony of the witness from the evidentiary hearing. Additionally, she claims that the witness provided untrue statements that are not based on the DPR. Finally, Employee argues that classification or job series have no impact on an employee having to serve another probationary period once having completed the required one-year probationary period. She explains that the difference in job series or classification series was not a reason to change her Career Permanent Status to Probationary Status. Therefore, Employee requests that the Second Initial Decision on Remand be reversed.

Agency filed its response to Employee's petition on September 17, 2018. It submits that the AJ was correct in finding substantial evidence to support the Second Initial Decision on Remand. Agency argues that Employee failed to establish that the witness's testimony was untruthful. It notes that Employee did not provide any witnesses of her own or any documents at the evidentiary hearing to rebut its witness's testimony. Additionally, Agency asserts that the evidence in the record clearly demonstrates that Employee was rehired through open competition in a different line of work and that although Employee had priority consideration through ARPP, the position was still subject to open competition because other individuals were competing for the position. Further, it explains that despite Employee's contentions, she was selected for the Public Health Outreach Technician position through reinstatement pursuant to DPM § 816.1. Agency asserts that the job announcement for the position for which Employee was hired was made available to the general public; therefore, the position was subject to open competition. Additionally, Agency reiterates that the Standard Form 50 (SF-50), which reflects that Employee was hired for a second time by Agency on February 16, 2010, also shows that Employee was hired through open competition. Therefore, it requests that the OEA Board uphold the Second Initial Decision on Remand.

On October 3, 2018, Employee filed a response to Agency's opposition to the petition. She argues that the job announcement and the SF-50 do not support

that she was hired through open competition. Additionally, Employee explains that open competition is the receipt of applications and consideration of individuals who were never employees of the District government and there is no evidence of applications or consideration from individuals who were never employed by the District government. Further, Employee maintains her same arguments that she was not rehired in a different line of work and that she was eligible for Career Service reinstatement. She, again, asserts that a different classification series is not a factor in having to serve a probationary period. Accordingly, she requests that the AJ's decision be reversed.

Employee filed a request for oral arguments on the Petition for Review on October 3, 2018. Subsequently, on October 26, 2018, Employee filed Public Comments Before the OEA Board. She submits the same arguments that were filed throughout her appeal. On October 29, 2018, Employee filed an addendum to her public comments. She, again, argues that the AJ must address the complicated issues raised by the parties as it pertains pursuant to DPR sections 816.1, 816.2, 816.4, and 816.5. On December 3, 2018 and February 8, 2019, Employee filed updates to her public comments. She maintains that at all times she was Career Service status.

2. **Larry Watson v. Office of the State Superintendent of Education, OEA Matter No. 1601-0011-18**– Employee worked as a Bus Attendant for Agency. On October 5, 2017, Agency terminated Employee for “any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: specifically – neglect of duty, insubordination, unauthorized absence, and absence without official leave.” Employee filed a Petition for Appeal with OEA on October 24, 2017. He claimed that he was harassed by Agency. Accordingly, Employee requested that he receive compensation and that he be reinstated to his position.

On November 6, 2017, Agency filed its Answer to Employee's Petition for Appeal. It argued that Employee ignored directives from his supervisors during his tour of duty, and he refused assignments to specific bus routes. Additionally, Agency contended that Employee had a deliberate disregard for the time and attendance rules which affected the integrity of its operations. Moreover, Agency asserted that Employee's removal was within the range of penalties for a third offense of neglect of duty, insubordination, and absence without official leave. Therefore, it requested that his appeal be denied.

The OEA Administrative Judge held an evidentiary hearing on July 10, 2018. However, Employee failed to appear. On July 11, 2018, the AJ issued an order for Employee to provide good cause for his failure to attend the evidentiary hearing. She explained that the order scheduling the date and time of the proceeding was issued on May 21, 2018, and a copy was mailed to Employee at the address listed by him in his Petition for Appeal. The AJ provided that neither the May 21st order nor any previous orders were returned

to OEA as undelivered. Therefore, she requested that Employee provide a good cause statement by July 26, 2018 for failing to attend the hearing.

On August 8, 2018, the AJ issued an Amended Initial Decision. She held that Employee failed to attend the evidentiary hearing and failed to show good cause for his failure to attend the hearing. The AJ provided that on the day of the hearing, once she was able to reach Employee by telephone, he failed to offer a reason for his failure to appear. She noted that she offered to delay the hearing to give him time to appear, but Employee declined. Furthermore, the AJ held that Employee did not file a good cause statement by the deadline. Consequently, she dismissed Employee's appeal.

On September 14, 2018, Employee filed a Petition for Review. He explains that due to unforeseen life altering events, he was unable to attend the scheduled hearings. Employee also provides that his supervisor was unprofessional; he was sent home under false accusations; and he was not compensated for working overtime. Moreover, he asserts that he made numerous complaints against his supervisor to Agency's Director, the District Attorney, the Superintendent of Public Schools, the Mayor, and the news media. Therefore, he requests that his petition be reinstated.

3. **Delores Junious v. Department of Human Services, OEA Matter No. 1601-0015-18** – Employee worked as a Social Worker with the Department of Human Services. On September 19, 2017, Employee received an Advance Notice of Proposed Thirty-Day Suspension based on charges of neglect of duty; failure to follow instructions; unexcused tardiness; and unauthorized absence. On October 27, 2017, Agency issued its Final Notice, sustaining the charges against Employee. She was subsequently suspended without pay from October 30, 2017 until November 28, 2017.

Employee filed a Petition for Appeal with the Office of Employee Appeals, arguing that she was wrongly suspended despite having no progressive discipline. She stated that the charges were falsified and exaggerated because of Agency's alleged lack of leadership, nepotism, and corruption. Therefore, Employee requested that her suspension be reversed with back pay and benefits.

Agency filed its response on December 29, 2017. It asserted that Employee was appropriately suspended for thirty days because of her continuous tardiness in reporting to work; failure to attend mandatory meetings; and failure to arrive for scheduled appointments on time. Agency contended that Employee failed to offer any exculpatory or mitigating reason why her Petition for Appeal should be granted and that she failed to state a claim upon which relief could be granted. Consequently, Agency requested that Employee's appeal be dismissed.

On April 10, 2018, an OEA Administrative Judge issued an Order Convening a Status/Prehearing Conference to assess the parties' arguments. On April 24,

2018, Agency filed a request for a continuance of the conference. The motion was granted and the status conference was rescheduled for June 13, 2018. On June 13, 2018, Employee contacted the AJ and requested a further continuance because she was still attempting to secure an attorney. The AJ granted Employee's request and issued a Third Order Convening a Status/Prehearing Conference on July 5, 2018. The order provided that the rescheduled date for the conference was August 6, 2018. Agency was present for the August 6, 2018 conference; however, Employee was not.

Because of Employee's absence, the AJ issued an Order for Statement of Good Cause, directing her to submit a statement of cause explaining her failure to appear at the status conference. Additionally, the notice provided that the failure to respond to the order in a timely fashion could result in the imposition of sanctions, including the dismissal of the matter. Employee did not submit a response to the Order for Statement of Good Cause before the prescribed deadline.

In her Initial Decision, the AJ held that in accordance with OEA Rule 621.1, OEA has the authority to impose sanctions upon parties as necessary to serve the ends of justice. She noted that the failure to take reasonable steps to prosecute or defend an appeal includes the failure to appear at a scheduled proceeding after receiving notice; failure to submit required documents after being provided with a deadline for such submission; and the failure to inform OEA of a change of address which results in correspondence being returned to this Office.

Based on the above, the AJ concluded that Employee failed to appear at the August 6, 2018 status conference and failed to provide a written response to the Order for Statement of Good Cause. Therefore, she concluded that Employee did not exercise the diligence expected of an appellant pursuing an appeal before this Office. Consequently, her appeal was dismissed.

Employee, through her newly-acquired counsel, disagreed and filed a Petition for Review with OEA's Board on September 28, 2018. She argues that her appeal should not have been dismissed for failure to prosecute because the AJ failed to establish good cause for dismissing the matter. Further, she states that dismissal was a harsh sanction for a *pro se* litigant who made efforts to comply with the AJ's order; communicated with the Office regarding her whereabouts; and requested an extension of time to respond to the Order for Statement of Good Cause after a reasonable delay. Therefore, Employee requests that the Board remand the matter for adjudication on its merits.

In response, Agency asserts that Employee failed to appear at OEA multiple times prior to the rescheduled August 6, 2018 conference. It explains that Employee was aware of the Order for Statement of Good Cause but failed to submit a response. Agency also reiterates that Employee was informed that she

was required to respond to the AJ's cause order to avoid dismissal of her appeal. Thus, it believes that the AJ correctly dismissed Employee's appeal for failure to prosecute and asks this Board to deny her Petition for Review.

4. **Janeka Reed v. Office of the State Superintendent of Education, OEA Matter No. 1601-0068-17**– Employee worked as a Bus Attendant with the Office of the State Superintendent of Education. On November 29, 2016, Employee was charged with “any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: unauthorized absence; absence without official leave; and neglect of duty.” On June 23, 2017, Agency issued its Notice of Final Decision on Proposed Removal, sustaining the charges against Employee. The effective date of her termination was June 23, 2017.

In her Petition for Appeal, Employee explained that she was out of work because of a medical condition and had issues with reasonable accommodations after returning to work. She argued that the work conditions exacerbated her medical condition, but Agency did not attempt to resolve the accommodation issues. As a result, Employee requested that Agency reinstate her with back pay and a promotion to a bus driver position.

Agency filed its response on August 16, 2017. It disagreed with Employee's assertions and contended that she was provided with two reasonable accommodations for her medical condition. Moreover, it stated that Employee was appropriately terminated because she failed to return to duty for more than ten days. Therefore, Agency opined that removal was within the range of penalties allowed under District law. Consequently, it requested that Employee's termination be upheld.

On December 5, 2017, an OEA Administrative Judge issued an Order Convening a Prehearing Conference to assess the parties' arguments. The parties were subsequently ordered to submit written briefs addressing whether Agency had cause to take adverse action against Employee for unauthorized absence; absence without official leave; and neglect of duty.

In its brief, Agency asserted that Employee was notified that her request for a leave of absence was granted from August 23, 2016 until October 19, 2016. It reasoned that Employee's prolonged absence served as a basis for charging with her with neglect of duty because she failed to resume her duties as a Bus Attendant on the specified date. Agency further reiterated that Employee was provided with reasonable accommodations for her medical issues in May of 2015 and September 14, 2016. Lastly, it noted that Employee was previously disciplined for absenteeism and tardiness in August of 2014. Therefore, Agency posited that removal was the appropriate penalty under the circumstances.

In her brief, Employee argued that her rights were violated under the Americans with Disabilities Act. She echoed her previous sentiment that Agency was obligated to provide her with the proper accommodations at work. Employee also disagreed with Agency's assertion that she was previously suspended for tardiness.

The AJ issued his Initial Decision on August 1, 2018. He noted that Employee's brief did not directly address her absences from October 20, 2016 through November 21, 2016, but instead raised several arguments regarding Agency's duty to provide her with reasonable accommodations. Conversely, the AJ stated that Agency offered background information relating to Employee's work history to demonstrate pattern of absenteeism. He agreed with Agency's position that Employee was absent without leave after October 20, 2016 because her request for leave was only partially granted through October 19, 2016.

Regarding the penalty, the AJ provided that under Chapter 6, Section 1619.6 of the D.C. Municipal Regulations, an appropriate penalty for a first-time offense of unauthorized absence, AWOL, and neglect of duty ranges from reprimand to removal. Based on a review of the record, the AJ concluded that Agency's termination action was within the penalties allowed under District law. Consequently, Employee's termination was upheld.

Employee disagreed with the Initial Decision and filed a Petition for Review with the OEA Board. She argues that Agency erred by claiming that she was on leave restriction and contends that she was never suspended for ten days during her tenure. Additionally, she states that Agency was contractually required to engage in an interactive process to address the leave issue. Finally, Employee asserts that many of the dates Agency referenced were inaccurate and reiterates that Agency refused to provide her with reasonable accommodations. Therefore, she asks that the Board grant her Petition for Review.

C. Deliberations – After the summaries were provided, Patricia Hobson Wilson moved that the meeting be closed for deliberations. Jelani Freeman seconded the motion. All Board members voted in favor of closing the meeting. Clarence Labor stated that, in accordance with D.C. Official Code § 2-575(b)(13), the meeting was closed for deliberations.

D. Open Portion of Meeting Resumed

E. Final Votes – Clarence Labor provided that the Board considered all of the matters. The following represents the final votes for each case:

1. Estate of Alexis Parker v. Department of Health

MEMBER	GRANTED	DENIED	REMANDE D	DISMISSED
Clarence Labor		X		
Vera Abbott		X		
Patricia Hobson Wilson		X		
Jelani Freeman		X		
Peter Rosenstein		X		

Five Board Members voted in favor of denying Employee's Petition for Review of the Second Initial Decision on Remand. Therefore, the petition was denied.

2. Larry Watson v. Office of the State Superintendent of Education

MEMBER	GRANTED	DENIED	REMANDE D	DISMISSED
Clarence Labor		X		
Vera Abbott		X		
Patricia Hobson Wilson		X		
Jelani Freeman		X		
Peter Rosenstein		X		

Five Board Members voted in favor of denying Employee's Petition for Review. Therefore, the petition was denied.

3. Delores Junious v. Department of Human Services

MEMBER	GRANTED	DENIED	REMANDE D	DISMISSED
Clarence Labor	X		X	
Vera Abbott	X		X	
Patricia Hobson Wilson	X		X	
Jelani Freeman	X		X	
Peter Rosenstein	X		X	

Five Board Members voted in favor of granting Employee's Petition for Review. Therefore, the petition was granted, and the matter was remanded to the Administrative Judge.

4. Janeka Reed v. Office of the State Superintendent of Education

MEMBER	GRANTED	DENIED	REMANDE D	DISMISSED
Clarence Labor		X		
Vera Abbott		X		
Patricia Hobson Wilson		X		

Jelani Freeman		X		
Peter Rosenstein		X		

Five Board Members voted in favor of denying Employee’s Petition for Review. Therefore, the petition was denied.

- F. Public Comments** – Abraham Davis, Jr. provided that he was disappointed in the ruling made by the Board. He believed that Agency did not meet its burden of proof. The Board explained that the decision would be mailed to the parties, and he could appeal to Superior Court.

- VI. Adjournment** – Jelani Freeman moved that the meeting be adjourned; Patricia Hobson Wilson seconded the motion. All members voted affirmatively to adjourn the meeting. Clarence Labor adjourned the meeting at 12:38 p.m.

**Respectfully Submitted,
Wynter Clarke
Paralegal Specialist**